Technicolor Government Services, Inc., South Dakota Operations *and* Motion Picture Laboratory Technicians, Local 780, and International Photographers of the Motion Picture Industries, Local 666, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO. Case 18-CA-7638

16 November 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 5 May 1983 Administrative Law Judge Richard L. Denison issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order, as modified.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Technicolor Government Services, Inc., South Dakota Operations, Sioux Falls, South Dakota, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

"(b) Offer any bargaining unit employees adversely affected by the unilateral changes in wages, working conditions, and other terms and conditions of employment instituted on or about 13 January 1982, immediate and full reinstatement to their former status, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered, in the manner set forth in the section of this Decision entitled 'The Remedy.'"

2. Substitute the attached notice for that of the administrative law judge.

[1] We have modified par. 2(b) of the judge's recommended Order in order to more appropriately remedy the violation found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with Motion Picture Laboratory Technicians, Local 780, and International Photographers of the Motion Picture Industries, Local 666, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, as the exclusive representative of the employees in the bargaining unit below by unilaterally changing the wages, working conditions, and other terms and conditions of employment of bargaining unit employees without notice to and consultation with their Union. The appropriate unit is:

> All full-time and regular part-time employees employed in the photographic laboratory, product inspection, data management, technical engineering photographic laboratory maintenance, center services and logistics sections, including plant clericals, employed at the Respondent's Sioux Falls, South Dakota facility; excluding employees employed in user services operations, systems development, systems software, technical engineering computer maintenance, technical communications, applications, training and assistance and data analysis sections, office clerical employees, confidential employees, guards, assistant supervisors and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the changes we made in the wages, working conditions, and other terms and conditions of employment of our bargaining unit employees serving as leadpersons, otherwise known as "leads," on or about 13 January 1982, without notice to and bargaining with their Union.

WE WILL offer those bargaining unit employees adversely affected by the changes made on or about 13 January 1982 to leadpersons immediate and full reinstatement to their former status and will make them whole for any loss of earnings they may have suffered, including interest, as a result of our unilateral action described above.

WE WILL bargain with Motion Picture Laboratory Technicians, Local 780, and International Photographers of the Motion Picture Industries, Local 666, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, as the exclusive representative of our employees in the above-appropriate unit with respect to any proposed changes in our bargaining unit employees' wages, hours, working conditions, and other terms and conditions of employment.

TECHNICOLOR GOVERNMENT SERVICES, INC., SOUTH DAKOTA OPERATIONS

DECISION

STATEMENT OF THE CASE

RICHARD L. DENISON, Administrative Law Judge: This case was heard at Sioux Falls, South Dakota, on December 1, 1982, based on an original charge filed by the Union on March 22, 1982. The complaint, issued May 25, 1982, as amended, alleges that Technicolor Government Services, Inc., South Dakota Operations,[1] the Respondent, violated Section 8(a)(1) and (5) of the Act in that on or about January 1982 the Respondent unilaterally changed the wages, benefits, and conditions of employment of its leadpersons by abolishing certain leadperson classifications, transferring the work previously performed by leadpersons in the bargaining unit to supervisors or other nonunit employees, and by reducing the wages of leadpersons.

The Respondent's answer denies the appropriateness of the certified bargaining unit and the allegations of unfair labor practices alleged in the complaint. Based on the entire record in the case, including my consideration of the briefs and observation of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Based on the allegations of fact in paragraphs 2(a), (b), (c), (d), (e), and 3 of the complaint admitted by the Respondent's answer, I find that the Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

The Respondent provides technical support for the Earth Resources Observation System, which processes data received from landsat satellites, and reproduces copies of this data and aerial photographs pursuant to a contract with the United States Government, Department of the Interior.

As alleged in the complaint and admitted in the answer, on or about September 21, 1978, a majority of the Respondent's employees in the appropriate collective-bargaining unit, through a secret-ballot election conducted under the supervision of the Regional Director for Region 18 of the National Labor Relations Board, designated and selected the Union as their collective-bargaining representative. On October 27, 1978, the Union was certified as the exclusive collective-bargaining representative of the employees in the said unit.[2]

Following the Union's certification the parties entered into negotiations to achieve a collective-bargaining agreement. As of the last bargaining session before the hearing in this case, held September 23, 1982, no agreement had been reached.

For a long time prior to the Union's certification the Respondent has utilized certain of its skilled employees, who occupy classifications within the bargaining unit, as leadpersons, or "leads." For example, Printing Processing Specialist B Irene Mildred DeNeui credibly testified that she had worked as a lead since 1974. The record shows that a "lead" is not a job classification, in the usual usage of the term, but is actually a pay status whereby an employee receives an additional 25 cents per hour for the period of time in which he or she assumes an assignment which relieves a supervisor of minor supervisory functions, such as training and other day-to-day routine duties required to run the production process.[3] According to the credited testimony by Vice President and General Manager of South Dakota Operations Joseph N. Pfliger and Vice President and Department Project Manager Harold Lockwood, as illustrated by Respondent's Exhibits 3 through 8, inclusive, leads are appointed pursuant to a memorandum of request and justification by the supervisor, and a review and approval by Pfliger and Lockwood. Respondent's Exhibits 3 through 8 consist of memoranda showing approximately 250 designations, removals, and changes of leads which occurred in the years 1977 through 1982. Andrew J. Younger, the Union's business manager, agreed in his testimony that since the Union has been certified it has been notified from time to time of the changes which the Company had made with respect to leads. Nevertheless, Younger explained that the Union had never before pur-

[1] The name of the Respondent appears as amended at the hearing.

[2] The certified unit is:

All full-time and regular part-time employees employed in the photographic laboratory, product inspection, data management, technical engineering photographic laboratory maintenance, center services and logistics sections, including plant clericals, employed at the Respondent's Sioux Falls, South Dakota facility; excluding employees employed in user services operations, systems development, systems software, technical engineering computer maintenance, technical communications, applications, training and assistance and data analysis sections, office clerical employees, confidential employees, guards, assistant supervisors and supervisors as defined in the Act.

The Respondent continues to maintain the original position it espoused during the representation proceeding, that the above unit, found to be appropriate by the Regional Director in his Decision and Direction of Election, is not an appropriate unit. However, the parties agree that a request for review of that unit determination was filed and denied by the Board. I am bound by the Board's decision. The unit is appropriate.

[3] The Respondent's policy setting forth in detail the responsibilities and duties of leads is contained in a memorandum dated March 20, 1978, in evidence as G.C. Exhs. 2(a) and (b).

sued the issue of not being given advance notice and an opportunity to bargain about these matters because previous designations, changes, and removals had not been considered by the Union to be detrimental to the interests of bargaining unit employees, and because there had been no previous complaints concerning this procedure.

An examination of Respondent's Exhibits 2 through 8 shows that as of the beginning of January 1982 the bargaining unit employees serving as leads in the Respondent's various department were:

Department	Employee
Center Services	K. Jorgenson
Data Management	Glenda Theel
	Dean Tyler
	Mary Weinkeimer
	Dwayne Wipf
Logistics	Douglas Brock
	Charles Wentler
Photo Lab	Irene DeNeui
	Dona Kaacke
	Kris Higgins
	Scott Meidl
	Edward Peters
	J. Powers
Quality Assurance	Lloyd Christian
	Bonnie Knuteson
	Annette McClaren

At the beginning of January 1982, the Respondent drastically reduced its use of leads. It is undisputed that this action was taken solely because of cost reductions necessitated by the new contract between the Respondent and the U.S. Government. Thus, on January 13, 1982, Project Manager Lockwood issued a memorandum to the Respondent's supervisors stating:

> Concurrently with the beginning of our new contract year with the Government, we are asking you to reexamine Administrative Procedure AP-2.7, Responsibilities and Duties of a Lead.
>
> The following definition will be followed when assigning leads (from AP-2.7):
>
> > "Lead: A Lead is any employee assigned the responsibility of directing the routine work operations to provide supplemental assistance to the Supervisor; to direct the work effort when a supervisor is not assigned to a particular shift; or to provide the necessary operational guidance when the Supervisor is absent."
>
> In general leads will be appointed *only* when a supervisor is not available.
>
> The results envisioned are:
>
> 1. Employee assignment, counselling and development will be done exclusively by supervisors or their assistants.
> 2. Senior operations technicians may still perform in that capacity; i.e., helping less senior technicians.
>
> In compliance with this operational philosophy, please notify Project Management of your proposed lead assignments.

Thirteen of the sixteen bargaining unit employees listed above who were serving as leads at that time testified that in early Janaury 1982, at various staff meetings conducted by the Respondent's supervision, they were informed of the loss of their lead status pursuant to the new policy enunciated in Lockwood's memorandum.[4] As a result of this change these employees now serve as leads only occasionally when their supervisor or assistant supervisor is absent. They have lost the additional 25 cents per hour they formerly received, including holidays, vacations, and other such periods off the clock, and now receive this wage supplement only on the rare occasions when they are selected to serve as a lead in the absence of the supervisor and when actually working on the clock.

The Respondent's severe reductions in the use of lead pay status was brought to the attention of Business Manager Younger by Irene DeNeui through a phone call to Younger's office at Cocoa Beach, Florida. It is conceded that Younger had no advance notice whatsoever from the Company. Younger called John Burke, the Respondent's attorney in Sioux Falls, South Dakota, and inquired concerning the matter. Professing no knowledge of the situation, Burke promised to check with the Respondent, and discuss the situation with Younger at the next negotiations session in Florida. At this meeting Burke told Younger that the Respondent had removed all the leads, not just at Sioux Falls, but throughout the entire Company. Younger adhered to the position that the Respondent had no right to remove leads and lead pay without bargaining with the Union. The discussion ended with Burke observing that Younger would need to bring the matter up at the next Local bargaining session in Sioux Falls on March 10. At that meeting Younger again raised the issue of the reductions of leads. The Company explained that its action had been prompted by the savings in costs necessitated by the accepted contract bid it had made to the Deparment of the Interior. Younger insisted that the Union had a right to negotiate concerning leads, and requested the restoration of the employees' lost lead status with backpay, pending resolution of the issue through negotiation. According to Younger, Project Manager Lockwood refused, stating that the question was not negotiable. Lockwood, who agreed that he attended the March meeting, testified that he did not remember any discussion of the subject of leads at that meeting. I credit Younger, whose testimony is corroborated by that of the Respondent's vice president and general manager, Joseph N. Pfliger. Pfliger remembered Younger protesting the reduction of leads at this session, and requesting that they be reinstated. According to

[4] Employees Kay Jorgenson, Donna Haacke, and J. Powers did not testify.

Pfliger, the Company responded that it believed its actions were appropriate within the prerogative of management, and it did not intend to reinstate the leads.

On March 22, 1982, Younger filed charges on behalf of the Union with Region 8 of the Board alleging that the Respondent violated Section 8(a)(1) and (5) of the Act by its action with respect to leads.

The final bargaining session prior to the hearing in this matter took place on September 23, 1982. At this time, Younger again requested the reinstitution of lead status for the affected employees with backpay pending settlement of the issue by negotiation. Both Younger and Pfliger agree that Pfliger answered to the effect that the NLRB hearing was pending on the situation, and, therefore, the Company really did not care to discuss the topic of leads.

Section 8(d) of the Act defines collective bargaining as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party . . . ." Thus, over many years, through constant refinement of the case law by the Board and the courts, many of the potentional topics for bargaining have come to be catalogued in one of two broad categories, either mandatory or permissive. Mandatory subjects are those concerning which the respective parties must, on request, bargain, or else risk being found to be in violation of Section 8(a)(5) of the Act. It is virtually axiomatic at this point in time that matters directly affecting employees' wages, hours, and terms and conditions of employment are mandatory subjects for bargaining. In this case it is clear that the employees' loss of lead pay and the elimination of their leadperson duties, tantamount to a demotion, falls well within the defined parameters of manadatory subjects for bargaining. The fact that in the past the Respondent felt obligated to and did notify the Union, albeit after the fact, of appointments, changes, and elimination of leads, is a tacit admission of the existence of this obligation. It is also well settled that unilateral changes in wages, hours, and terms and conditions of employment, during a period in which an employer is required by law to bargain with the exclusive collective-bargaining representative of its employees, violates Section 8(a)(5) of the Act. *NLRB v. Katz*, 369 U.S. 736, 747 (1962); *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967). This general principal governs even when an independent showing of overall subjective bad faith is lacking. Likewise, a demonstration of economic expediency, even in good faith, does not relieve the obligation. *Fleming Mfg. Co.*, 119 NLRB 452, 465 (1957).

However, the Respondent argues that in this instance it has been relieved of its obligation to bargain. The Respondent urges that its collective-bargaining agreements at other locations, specifically Houston, contain clauses which, in effect, give management virtual autonomy with respect to the appointment, change, and removal of leads. Likewise, the Respondent cites the case of *Boise Cascade Corp.*, 263 NLRB 480 (1982), as supporting its position that its right to unilaterally designate, alter, or eliminate the status of leads is a management prerogative. I disagree. The Respondent overlooks the fact that in both instances it cites as precedent there was in existence a collective-bargaining agreement with a specific provision permitting the Respondent to act unilaterally. For the Respondent to eliminate lead status and lead pay pursuant to the specific provisions of a contract arrived at through collective bargaining with the employees' lawful representative is one thing, but to unilaterally change employees' wages, working conditions, and terms and conditions of employment without affording the Union any opportunity to bargain whatsoever is quite another.

The Respondent also contends that the Union, by virtue of the fact that it had not previously requested bargaining concerning leads and had not previously made an issue of the many individual lead changes which occurred between 1977 and 1982, waived bargaining concerning this question, or, at least, acquiesced to the Respondent's actions. I also reject this argument. The Board has consistently held that for the employer to establish by way of consultation and bargaining, the surrounding facts and circumstances must demonstrate that the relinguishment of the right is clear and unmistakable. *McDonnell Douglas Corp.*, 224 NLRB 881, 887 (1976); *Pepsi-Cola Distributing Co. of Knoxville, Tennessee*, 241 NLRB 869 (1979). Accordingly, the defense of waiver has been rejected, absent an explicit waiver, even in cases where the collective-bargaining agreement contained a management rights' clause which made no specific reference to the area changed, and, further, in circumstances where the contract contained a zipper clause. *Latex Industries*, 252 NLRB 855, 857–858 (1980). Indeed, there is no contention that the Union explicitly waived its right to negotiate at Sioux Falls concerning leads. Rather, I am asked to infer such a waiver from clauses which exist in other negotiated contracts at other locations coupled with previous inaction on the part of the employee's representation. This the applicable case law clearly prohibits me from doing. Moreover, there is no evidence that the Union acquiesced in the Respondent's virtual wholesale elimination of its leadperson program at Sioux Falls. As Business Manager Younger explained, the set of circumstances which the Union and the employees in the bargaining unit faced in January 1982 was totally different from those confronting the Union with respect to leads at any time before. Thus, as Younger stated, previous individual changes in lead status, although many in number, had never posed a threat to the work of the bargaining unit, nor had any employee, prior to DeNeui's phone call in January 1982, ever focused the Union's attention on the potential problem such changes represented. If the Respondent's viewpoint concerning what constitutes acquiescence were accepted, a union would necessarily have to request bargaining in every conceivable area in which a potential problem could arise in order to preserve its right to bargain whenever an actual problem in that area might arise. The result would be a terrible waste in time and resources for both unions and management. In my view, such reasoning

lacks merit. Lastly, it is undisputed that the Respondent flatly refused to negotiate with the Union concerning the leadperson issue at both the March and September bargaining sessions. I therefore find that the Respondent violated Section 8(a)(1) and (5) of the Act as alleged in the complaint.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time employees employed in the photographic laboratory, product inspection, data management, technical engineering photographic laboratory maintenance, center services and logistics sections, including plant clericals, employed at the Respondent's Sioux Falls, South Dakota facility; excluding employees employed in user services operations, systems development, systems software, technical engineering computer maintenance, technical communications, applications, training and assistance and data analysis sections, office clerical employees, confidential employees, guards, assistant supervisors and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times since October 27, 1978, and continuing to date, the Union has been the representative for the purpose of collective bargaining of the employees in the unit described above, and by virtue of Section 9(a) of the Act has been, and is now, the exclusive representative of all employees in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

5. By unilaterally changing the wages, working conditions, and other terms and conditions of employment of its bargaining unit employees serving as leadpersons, otherwise known as leads, on and after early January 1982, without prior notice to and consultaton with the Union, the Respondent violated Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it will be recommended that the Respondent cease and desist therefrom and take certain affirmative action designated to effectuate the policies of the Act. Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the wages, working conditions, and other terms and conditions of employment of its bargaining unit employees serving as leadpersons, known as leads, on or about January 13, 1982, and thereafter, without notice to or bargaining with the Union, it will be recommended that the Respondent rescind these unilateral changes, and, henceforth, notify and bargain with the Union concerning any contemplated changes in the wages, hours, working conditions, and other terms and conditions of employment of bargaining unit employees. It will also be recommended that the Respondent restore the status quo which existed at the time of its unlawful actions by rescinding its January 1982 curtailment of lead status and pay, as described herein. Accordingly, the Respondent will be ordered to offer any bargaining unit employees adversely affected by this action immediate and full reinstatement to their former positions and make them whole for any loss of earnings they may have suffered, including interest, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 117 (1977).[5]

The Respondent will also be ordered to post an appropriate notice.

On the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended

ORDER[6]

The Respondent, Technicolor Government Services, Inc., South Dakota Operations, Sioux Falls, South Dakota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Motion Picture Laboratory Technicians, Local 780, and International Photographers of the Motion Picture Industries, Local 666, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, as the exclusive representative of the employees in the bargaining unit below by unilaterally changing the wages, working conditions, and other terms and conditions of employment, of its leadperson, otherwise known as leads, without notice to or consultation with the Union. The appropriate unit is:

> All full-time and regular part-time employees employed in the photographic laboratory, product inspection, data management, technical engineering photographic laboratory maintenance, center services and logistics sections, including plant clericals, employed at the Respondent's Sioux Falls, South Dakota facility; excluding employees employed in user services operations, systems development, systems software, technical engineering computer maintenance, tehcnical communications, applications, training and assistance and data analysis sections, office clerical employees, confidential employees, guards, assistant supervisors and supervisors as defined in the Act.

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[5] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Rescind the unilateral changes in wages, working conditions, and other terms and conditions of employment instituted on or about January 13, 1982, with respect to its bargaining unit employees serving as leadpersons, otherwise known as leads.

(b) Offer any bargaining unit employees who lost their status as leadpersons, or leads, as a result of the unilateral changes in wages, working conditions, and other terms and conditions of employment instituted on or about January 13, 1982, immediate and full reinstatement to their former status, without prejudice to their seniority and other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered in the manner set forth in the section of this Decision entitled "The Remedy."

(c) On request, bargain with the Union with respect to any contemplated changes in wages, hours, working conditions, or other terms and conditions of employment of bargaining unit employees, and if an agreement is reached embody any understanding reached in the signed agreement.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Sioux Falls, South Dakota facility copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 18, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply.

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[7] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."